No. 75-1014

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ARIZONA PUBLIC SERVICE COMPANY, ET AL., PETITIONERS

v.

ARIZONA POWER POOLING ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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The Colorado River Basin Project Act, 82 Stat. 885 887-893 43 U.S.C. 1501, 1521-1528, authorizes the Secretary of the Interior to conduct, operate and maintain the Central Arizona Project, consisting of a system of reservoirs, dams and canals that furnish irrigation water and municipal water to arid areas of Arizona and western New Mexico. The Secretary was directed to recommend to Congress by September 30, 1969, a plan for obtaining electrical energy for such a project, which could include agreements with private utility companies for participation in the construction and operation of thermal electric generating plants (43 U.S.C. 1523). The Act further provides that "[w]hen not required for the * * * Project, the power and energy acquired by such agreements may be disposed of * * * by the Secretary" (43 U.S.C. 1523(b)).

The Act incorporates (43 U.S.C. 1554) the federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, as added to, 53 Stat. 1187, 1194-1195) which provide, in pertinent part, that preference in the sale of electric power by the United States shall be given to municipalities and other public corporations or agencies (preference customers) (43 U.S.C. 485h(c)).

Pursuant to this authority, the Secretary entered into an agreement with three of the petitioners and others to construct a thermal generating plant (the Navajo Project) under which the federal government would bear a portion of its cost in return for 24.3 percent of the Navajo Project's power output (Pet. App. 22). Since the Navajo Project was to be operational before the federal government would need the power, the Secretary agreed that petitioners and two preference customers could purchase its share of the power in the interim (Pet. App. 23).[1]

On September 30, 1969, the Secretary submitted this plan to Congress. The Secretary did not discuss in detail how he proposed to dispose of the interim power that was not yet needed by the federal government.[2] Congress approved the plan (Pet. App. 24).

Several preference customers subsequently commenced this suit in the District Court for the District of Arizona against the Secretary, the Commissioner of the Bureau of Reclamation, and the non-preference utility companies with which the Secretary had contracted to sell the interim

[1]Petitioners, private investor-owned utility companies, are non-preference customers. The two preference customers also participated in the agreement to construct the power plant (Pet. App. 23).

[2]The Secretary's only reference to the existence and disposition of interim power was that Southern California Edison Company (a non-preference customer) would purchase "a major portion of United States entitlement to generation and transmission prior to need for Central Arizona Project pumping" (Pet. App. 24).

power, alleging that the Secretary had no authority to dispose of the interim power to non-preference customers and seeking injunctive and declaratory relief (Pet. App. 20). The district court granted the government's motion for summary judgment, holding that the Secretary's decision to dispose of the interim power was "committed to agency discretion by law" within the meaning of the Administrative Procedure Act, 5 U.S.C. 701(a)(2), and therefore was not reviewable; and, alternatively, that Congress had by implication repealed the preference provision when it approved the Secretary's plan (Pet. App. 40-41).

The court of appeals reversed and remanded (Pet. App. 31). The court reasoned that Congress intended to limit the Secretary's discretion by requiring that the interim power be offered to preference customers and that, as a result, there was "law to apply" that made the decision reviewable (Pet. App. 30);[3] and that congressional approval of the plan could not be taken as an indication that Congress intended to repeal the preference provision since the record did not indicate whether Congress knew that preference customers had sought and been refused an opportunity to purchase the interim power (Pet. App. 27).

1. There is no reason for the Court to review the case in its present posture. The court of appeals has reversed the district court's summary judgment for the defendants and has remanded the case to the district court so that it may determine whether the Secretary abused his discretion under the Act by selling interim power to non-preference

[3]The court noted that Congress intended that the preference provision apply to sales of thermal electric power (Pet. App. 25-26). The Secretary consistently has applied the preference provision to sales of thermal electric as well as hydro-electric power. Such construction, which is consistent with the language and purpose of the provision, is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16-18.

customers.[4] The government also will have an opportunity on remand to show that Congress in fact was apprised of the Secretary's plan for disposition of the interim power and that the Secretary in fact offered the interim power to preference customers prior to offering it to non-preference customers.[5] Accordingly, the case is likely to be in a quite different posture after the remand proceedings have been completed. At the very least, the facts underlying the legal issues that petitioners raise will be more fully developed as a result of the proceedings on remand.

2. In any event, the question of the proper disposition of interim power from the Navajo Project does not appear to be a matter of such general importance that it warrants this Court's attention. That question, turning upon the extent of the Secretary's authority under a particular plan that is applicable only to one federally-funded thermal generating plant, has no significance beyond the particular circumstances of this case. The court of appeals' decision will not seriously hinder the Secretary's administration of the Act. Preference and non-preference customers are charged the same price for federal power; accordingly, the only cost at stake in this litigation is the difference that preference customers must pay between the price of the interim power to which they allege preferential rights and the price of alternate sources of power that they have obtained.

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[4]The court of appeals acknowledged that the preference provision is inapplicable where the Secretary determines that extension of the preference would impair the efficiency of the reclamation project (43 U.S.C. 485h(c)) (Pet. App. 30).

[5]See Pet. App. 34.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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